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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 PATRICK S. CARROLL,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Acting
10 Commissioner of Social Security,

11 Defendant.

Case No. 2:15-cv-01077-JLR-KLS

REPORT AND RECOMMENDATION

Noted for June 3, 2016

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14 Plaintiff has brought this matter for judicial review of defendant's denial of his
15 application for disability insurance benefits. This matter has been referred to the undersigned
16 Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule MJR 4(a)(4) and as
17 authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261 (1976). For the reasons set
18 forth below, the undersigned recommends that the Court reverse defendant's decision to deny
19 benefits and remand this matter for further administrative proceedings.
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21 FACTUAL AND PROCEDURAL HISTORY

22 On March 27, 2009, plaintiff filed an application for disability insurance benefits,
23 alleging disability as of June 16, 2008. *See* Dkt. 9, Administrative Record ("AR") 76. That
24 application was denied upon initial administrative review on July 24, 2009, and on
25 reconsideration on December 7, 2009. Following a hearing held before an administrative law
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1 judge (“ALJ”) on December 22, 2009, plaintiff was found to be not disabled by that ALJ in a
 2 decision dated February 1, 2011. *See AR 76–83.* It appears that the ALJ’s decision became the
 3 Commissioner’s final decision, as there is no indication the Commissioner reopened it and
 4 plaintiff does not allege that it was reopened by the actions of the second ALJ discussed below or
 5 that it now should be.¹

6 On November 16, 2012, plaintiff filed a second application for disability insurance
 7 benefits, initially alleging disability as of June 12, 2008. *See AR 181.* That application was
 8 denied upon initial administrative review on March 13, 2013, and on reconsideration on June 12,
 9 2013. *See AR 18.* On January 15, 2014, a hearing was held before a different ALJ, at which
 10 plaintiff, represented by counsel, appeared and testified, as did a vocational expert. *See id.* At
 11 that hearing, plaintiff amended his alleged onset date of disability to May 1, 2011. *Id.*

12 In a decision dated April 24, 2014, the second ALJ determined that plaintiff had not met
 13 his burden of rebutting the presumption of continuing non-disability established by the prior
 14 ALJ’s decision, and that he was not disabled and thus not entitled to disability benefits. *See AR*
 15 18–34. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals Council on
 16 May 5, 2015, making that decision the final decision of the Commissioner of Social Security (the
 17 “Commissioner”). *See AR 1; 20 C.F.R. § 404.981, § 416.1481.* On July 7, 2015, plaintiff filed a
 18 complaint in this Court seeking judicial review of the Commissioner’s final decision. *See Dkt. 3.*

23 ¹ A final decision of the Commissioner may be reopened where the ALJ “considers ‘on the merits’ the issue of the
 24 claimant’s disability during the already-adjudicated period.” *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1996); *see also Lewis v. Apfel*, 236 F.3d 503, 510 (9th Cir. 2001). If “such a de facto reopening occurs, the Commissioner’s
 25 decision as to the prior period is subject to judicial review.” *Lester*, 81 F.3d at 827. “[W]here the [ALJ’s] discussion
 26 of the merits is followed by a specific conclusion that the claim is denied on res judicata grounds,” though, “the
 decision should not be interpreted as re-opening the claim and is therefore not reviewable.” *Krumpelman v. Heckler*,
 767 F.2d 586, 589 (9th Cir. 1985) (citation omitted). As discussed below, the second ALJ expressly found plaintiff
 had not rebutted the presumption of continuing non-disability established by the prior ALJ’s decision. *See AR 18.*
 The undersigned thus agrees that no reopening of the prior ALJ’s decision has occurred or should occur.

The administrative record was filed with the Court on December 21, 2015. *See* Dkt. 9. The parties have completed their briefing, and thus this matter is now ripe for the Court's review.

Plaintiff argues defendant's decision to deny benefits should be reversed and remanded for further administrative proceedings, because the second ALJ erred: (1) in evaluating the medical evidence in the record; (2) in finding plaintiff to be capable of returning to his past relevant work; and (3) in finding plaintiff had not rebutted the presumption of continuing non-disability. For the reasons set forth below, the undersigned agrees that the ALJ erred in evaluating the medical evidence in the record, and thus in assessing plaintiff's ability to return to his past relevant work. The undersigned also agrees the ALJ erred in determining plaintiff had not rebutted the presumption of continuing non-disability, but finds that the error was harmless. Finally, for the reasons set forth below, the undersigned recommends that the Court reverse defendant's decision and that it remand this matter for further administrative proceedings.

DISCUSSION

The determination of the Commissioner that a claimant is not disabled must be upheld by the Court, if the “proper legal standards” have been applied by the Commissioner, and the “substantial evidence in the record as a whole supports” that determination. *Hoffman v. Heckler*, 785 F.2d 1423, 1425 (9th Cir. 1986); see also *Batson v. Commissioner of Social Security Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Carr v. Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991) (“A decision supported by substantial evidence will, nevertheless, be set aside if the proper legal standards were not applied in weighing the evidence and making the decision.”) (citing *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987)).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation

1 omitted); *see also Batson*, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if
 2 supported by inferences reasonably drawn from the record.”). “The substantial evidence test
 3 requires that the reviewing court determine” whether the Commissioner’s decision is “supported
 4 by more than a scintilla of evidence, although less than a preponderance of the evidence is
 5 required.” *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence
 6 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.
 7 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence
 8 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting
 9 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).²

11 I. The ALJ’s Evaluation of the Medical Evidence in the Record

12 The ALJ is responsible for determining credibility and resolving ambiguities and
 13 conflicts in the medical evidence. *See Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).
 14 Where the medical evidence in the record is not conclusive, “questions of credibility and
 15 resolution of conflicts” are solely the functions of the ALJ. *Sample v. Schweiker*, 694 F.2d 639,
 16 642 (9th Cir. 1982). In such cases, “the ALJ’s conclusion must be upheld.” *Morgan v.*
 17 *Commissioner of the Social Security Admin.*, 169 F.3d 595, 601 (9th Cir. 1999). Determining
 18 whether inconsistencies in the medical evidence “are material (or are in fact inconsistencies at
 19 all) and whether certain factors are relevant to discount” the opinions of medical experts “falls
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22 ² As the Ninth Circuit has further explained:

23 . . . It is immaterial that the evidence in a case would permit a different conclusion than that
 24 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by
 25 substantial evidence, the courts are required to accept them. It is the function of the
 26 [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may
 not try the case de novo, neither may it abdicate its traditional function of review. It must
 scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are
 rational. If they are . . . they must be upheld.

Sorenson, 514 F.2d at 1119 n.10.

1 within this responsibility.” *Id.* at 603.

2 In resolving questions of credibility and conflicts in the evidence, an ALJ’s findings
3 “must be supported by specific, cogent reasons.” *Reddick*, 157 F.3d at 725. The ALJ can do this
4 “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
5 stating his interpretation thereof, and making findings.” *Id.* The ALJ also may draw inferences
6 “logically flowing from the evidence.” *Sample*, 694 F.2d at 642. Further, the Court itself may
7 draw “specific and legitimate inferences from the ALJ’s opinion.” *Magallanes v. Bowen*, 881
8 F.2d 747, 755 (9th Cir. 1989).

9 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
10 opinion of either a treating or examining physician. *Lester*, 81 F.3d at 830. Even when a treating
11 or examining physician’s opinion is contradicted, that opinion “can only be rejected for specific
12 and legitimate reasons that are supported by substantial evidence in the record.” *Id.* at 830–31.
13 However, the ALJ “need not discuss *all* evidence presented” to him or her. *Vincent on Behalf of
14 Vincent v. Heckler*, 739 F.2d 1393, 1394–95 (9th Cir. 1984) (citation omitted) (emphasis in
15 original). The ALJ must only explain why “significant probative evidence has been rejected.”
16 *Id.*; see also *Cotter v. Harris*, 642 F.2d 700, 706–07 (3rd Cir. 1981); *Garfield v. Schweiker*, 732
17 F.2d 605, 610 (7th Cir. 1984).

18 In general, more weight is given to a treating physician’s opinion than to the opinions of
19 those who do not treat the claimant. See *Lester*, 81 F.3d at 830. On the other hand, an ALJ need
20 not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and
21 inadequately supported by clinical findings” or “by the record as a whole.” *Batson*, 359 F.3d at
22 1195; see also *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*,
23 242 F.3d 1144, 1149 (9th Cir. 2001). An examining physician’s opinion is “entitled to greater
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1 weight than the opinion of a nonexamining physician.” *Lester*, 81 F.3d at 830–31. A non-
2 examining physician’s opinion may constitute substantial evidence if “it is consistent with other
3 independent evidence in the record.” *Id.* at 830–31; *Tonapetyan*, 242 F.3d at 1149.

4 A. *Dr. Perez*

5 Plaintiff challenges the ALJ’s following findings regarding the medical opinion evidence
6 in the record:

7 I give little weight to the October 2013 opinion of M[a]tthew Perez, M.D. (B14F).
8 In a medical source statement of the claimant’s physical residual functional
9 capacity, Dr. Perez opined that the claimant can lift or carry 20 pounds
10 occasionally and 10 pounds frequently. He can stand for one hour in an eight-hour
11 day in 30-minute intervals, walk for two hours in an eight-hour workday, and can
12 sit for three hours in an eight-hour workday in 30-minute intervals. Furthermore,
13 Dr. Perez opined that the claimant can balance, and finger and feel with bilateral
14 hands unlimitedly. Yet, he said the claimant is limited to occasionally reach,
15 push, pull, climb stairs and ramps; and frequently handle with bilateral hands; and
16 occasional operation of foot controls with bilateral feet. Also, he opined that the
17 claimant cannot climb ladders, ropes, or scaffolds, crouch, and crawl. Dr. Perez
18 stated that the claimant can tolerate occasional exposures to operating a motor
19 vehicle and extreme temperatures, and moderate noise. However, he opined that
20 the claimant cannot expose to any unprotected heights and vibrations (B14F). **I**
21 **give little weight to the opinion of Dr. Perez because his opinion appears to be**
22 **based primarily on the subjective report of symptoms and limitations provided**
23 **by the claimant, and seemed to uncritically accept as true most, if not all, of**
24 **what the claimant reported.** Yet, as explained elsewhere in this decision, there
25 exist good reasons for questioning the reliability of the claimant’s subjective
26 complaints. The objective records do not appear to support the level of
restrictions. Moreover, even though the document was titled “medical source
statement,” the record lacks evidence to establish that Dr. Perez had a long
treating relationship with the claimant. Rather, I note that the earliest dated
treatment notes from Dr. Perez was dated September 24, 2013 where Dr. Perez
stated he is happy to meet with the claimant and asked that claimant to complete
an intake form and make an appointment in two weeks (B12F4). This language
suggests that Dr. Perez was either just starting to treat the claimant or yet to begin
treatment. Therefore, at the time when making this statement, Dr. Perez was not
the medical professional most able to provide a detailed, longitudinal picture of
the claimant’s medical impairments or might bring a unique perspective to the
medical evidence. As early as a couple of weeks after Dr. Perez completed this
statement, he already noted that the claimant reported improved pain with
treatment (B17F3).

1 *See AR 31–32* (emphasis added). Plaintiff argues that these are insufficient reasons for rejecting
2 Dr. Perez’s opinion. The undersigned agrees.

3 The ALJ’s primary reason for discrediting Dr. Perez’s opinion is that he found it was
4 based on plaintiff’s subjective complaints and was not supported by the objective evidence in the
5 record. *See AR 31*. According to the Ninth Circuit, “[an] ALJ may reject a treating physician’s
6 opinion if it is based ‘to a large extent’ on a claimant self-reports that have been properly
7 discounted as incredible.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (quoting
8 *Morgan v. Comm’r. Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (citing *Fair v. Bowen*,
9 885 F.2d 597, 605 (9th Cir. 1989))). However, like all findings by the ALJ, a finding that a
10 doctor’s opinion is based largely on a claimant’s own accounts of his symptoms and limitations
11 must be based on substantial evidence in the record as a whole. *See Bayliss v. Barnhart*, 427 F.3d
12 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)). This
13 situation is distinguishable from one in which the doctor provides his own observations in
14 support of his assessments and opinions. *See Ryan v. Comm’r of Soc. Sec. Admin.*, 528 F.3d 1194,
15 1199–1200 (9th Cir. 2008) (“an ALJ does not provide clear and convincing reasons for rejecting
16 an examining physician’s opinion by questioning the credibility of the patient’s complaints
17 where the doctor does not discredit those complaints and supports his ultimate opinion with his
18 own observations”); *see also Edlund v. Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001).

19 Here, the ALJ’s finding that Dr. Perez’s opinion is based primarily on plaintiff’s
20 subjective complaints is not supported by substantial evidence. Rather, Dr. Perez’s opinion
21 appears to have been based, at least in part, on his clinical observations during plaintiff’s office
22 visit as well as diagnostic testing. *See AR 384–90*. For example, in assessing plaintiff’s ability to
23 lift or carry, Dr. Perez noted “XRays of back showing mild to moderate degenerative changes in

1 the spine.” *See* AR 384. In assessing plaintiff’s ability to sit, stand, or walk, Dr. Perez noted that
2 plaintiff “[c]annot sit or stand for the entirety of our office visits [and] is constantly shifting
3 position.” *See* AR at 385. Finally, with respect to postural activities, Dr. Perez noted that his
4 opinion of plaintiff’s abilities was based on plaintiff’s “behavior in exam room with difficulties
5 staying seated [and] standing.” *See* AR 387. In short, the record does not demonstrate that that
6 Dr. Perez based his opinion primarily on plaintiff’s subjective complaints. Thus, the ALJ’s
7 conclusion that Dr. Perez’s opinion was based in large part on subjective complaints was not
8 supported by substantial evidence, and therefore was not a valid reason to discredit Dr. Perez’s
9 opinion. *See Bayliss*, 427 F.3d at 1214 n.1.

11 The additional reason given by the ALJ to discredit Dr. Perez’s opinion is that Dr. Perez
12 did not treat plaintiff for a long period of time. When evaluating the weight to be given to a
13 treating doctor, if the ALJ does not give controlling weight to the treating source’s opinion, the
14 ALJ will “apply the factors listed in paragraphs [20 C.F.R. § 404.1527](c)(2)(i) and (c)(2)(ii) of
15 this section, as well as the factors in paragraphs [20 C.F.R. § 404.1527](c)(3) through (c)(6) of
16 this section in determining the weight to give the opinion.” 20 C.F.R. § 404.1527(c)(2). Such
17 factors include the length of the treatment relationship; the frequency of examination; the nature
18 and extent of the treatment relationship; supportability of the opinion; consistency of the opinion;
19 specialization of the doctor; and, other factors, such as “the amount of understanding of [the]
20 disability programs and their evidentiary requirements.” 20 C.F.R. § 404.1527(c). As noted
21 above, the ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
22 opinion of either a treating or examining physician or psychologist. *Lester*, 81 F.3d at 830 (citing
23 *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th
24 Cir. 1990)). When a treating or examining physician’s opinion is contradicted, that opinion can

1 be rejected “for specific and legitimate reasons that are supported by substantial evidence in the
 2 record.” *Lester*, 81 F.3d at 830–31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir.
 3 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can accomplish this by
 4 “setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
 5 stating his interpretation thereof, and making findings.” *Reddick*, 157 F.3d at 725 (citing
 6 *Magallanes*, 881 F.2d at 751).

7 Here, the ALJ assigned little weight to Dr. Perez’s opinion in part because Dr. Perez had
 8 not treated plaintiff for a long period of time, and “as early as a couple of weeks after Dr. Perez
 9 completed [the medical source] statement, he already noted that the claimant reported improved
 10 pain with treatment.” *See AR 32*. While evidence of improvement can be a valid reason to reject
 11 a medical source’s opinion, the ALJ cited to one notation that Dr. Perez was “happy to hear
 12 things are getting a little better” as evidence of improvement. AR 401. This one citation,
 13 unsupported by other evidence in the record, is an insufficient basis to eject Dr. Perez’s opinion.
 14 Accordingly, none of the reasons provided by the ALJ to reject Dr. Perez’s opinion are specific,
 15 legitimate, and supported by substantial evidence. *See Reddick*, 157 F.3d at 725.

16 The Ninth Circuit has “recognized that harmless error principles apply in the Social
 17 Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (citing *Stout v.*
 18 *Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th Cir. 2006) (collecting
 19 cases)). The court noted that “in each case we look at the record as a whole to determine [if] the
 20 error alters the outcome of the case.” *Id.* The court also noted that the Ninth Circuit has “adhered
 21 to the general principle that an ALJ’s error is harmless where it is ‘inconsequential to the
 22 ultimate nondisability determination.’” *Id.* (quoting *Carmickle v. Comm’r Soc. Sec. Admin.*, 533
 23 F.3d 1155, 1162 (9th Cir. 2008)) (other citations omitted). The court further noted the necessity to
 24

1 follow the rule that courts must review cases “‘without regard to errors’ that do not affect the
 2 parties’ ‘substantial rights.’” *Id.* at 1118 (quoting *Shinsheki v. Sanders*, 556 U.S. 396, 407, 129
 3 S.Ct. 1696, 173 L.Ed.2d 532 (2009) (quoting 28 U.S.C. § 2111) (codification of the harmless
 4 error rule)). The ALJ did not include all of the functional limitations opined by Dr. Perez in the
 5 residual functional capacity finding discussed below. Had Dr. Perez’s opinion been given greater
 6 weight, the ultimate disability determination may have changed. Thus, the ALJ’s error in
 7 evaluating that opinion was not harmless.
 8

9 B. *Dr. Becker*

10 Plaintiff also finds fault with the following findings made by the ALJ:

11 I give no weight to the January 2014 assessment by Theodore Baker, Ph.D.
 12 (B19F) because it was done after the date last insured of December 31, 2013.
 13 Moreover, I do not find it persuasive when it is not supported by the objective
 14 findings in the record.

15 AR 32. Specifically, plaintiff asserts that the ALJ should have considered Dr. Becker’s
 16 evaluation because the evaluation was completed shortly after the date last insured and the ALJ
 17 erred in finding that Dr. Becker’s assessment is not supported by the objective findings in the
 18 record. The undersigned agrees.

19 The ALJ rejected Dr. Becker’s opinion because Dr. Becker began treating plaintiff after
 20 the date last insured. *See* AR 32. However, the record indicates that Dr. Becker first treated
 21 plaintiff in January 2014, just days after the date last insured. *See* AR 438. Medical reports
 22 “containing observations made after the period for disability are relevant to assess the claimant’s
 23 disability” during the disability period. *Lester*, 81 F.3d at 832; *Smith v. Bowen*, 849 F.2d 1222,
 24 1225 (9th Cir. 1988); *Kemp v. Weinberger*, 522 F.2d 967, 969 (9th Cir. 1975). Because such
 25 reports “are inevitably rendered retrospectively,” they “should not be disregarded solely on that
 26 basis.” *Smith*, 849 F.2d at 1225 (citing *Bilby v. Schweiker*, 762 F.2d 716, 719 (9th Cir. 1985)).

1 Dr. Becker treated plaintiff in close proximity to plaintiff's date last insured, and therefore the
 2 findings contained therein certainly could be relevant to plaintiff's condition during the pertinent
 3 time period. For this reason, the rationale offered by the ALJ to reject Dr. Becker's opinion is not
 4 supported by substantial evidence in the record. *See Hoffman*, 785 F.2d at 1425.

5 The ALJ also rejected Dr. Becker's opinion with a blanket statement that he did not "find
 6 it persuasive when it is not supported by the objective findings in the record." *See AR* at 32.
 7 Such a blanket statement lacks specificity required by the Court. As noted by the Ninth Circuit:

8 To say that medical opinions are not supported by sufficient objective findings
 9 or are contrary to the preponderant conclusions mandated by the objective
 10 findings does not achieve the level of specificity our prior cases have required,
 11 even when the objective factors are listed *seriatim*. The ALJ must do more than
 12 offer his conclusions. He must set forth his own interpretations and explain
 13 why they, rather than the doctors', are correct. Moreover[,] the ALJ's analysis
 14 does not give proper weight to the subjective elements of the doctors'
 15 diagnoses. The subjective judgments of treating physicians are important, and
 16 properly play a part in their medical evaluations.

17 *Embrey v. Bowen*, 849 F.2d 418, 421–22 (9th Cir. 1988) (internal footnote omitted); *see also* 20
 18 C.F.R. §§ 404.1527(a)(2) ("Medical opinions are statements from physicians and psychologists
 19 or other acceptable medical sources that reflect judgments about the nature and severity of your
 20 impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite
 21 impairment(s), and your physical or mental restrictions"). Accordingly, the ALJ's blanket
 22 statement is inadequate, and thus does not provide specific and legitimate basis for rejecting Dr.
 23 Becker's opinion.

24 II. The ALJ's Step Four Determination

25 At step four of the Commissioner's sequential disability evaluation process,³ the ALJ

26 ³ The Commissioner employs a five-step "sequential evaluation process" to determine whether a claimant is
 27 disabled. *See* 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any particular step thereof,
 28 the disability determination is made at that step, and the sequential evaluation process ends. *See id.*

1 found plaintiff to be capable of performing his past relevant work as a collections clerk and
2 janitor. *See AR 33.* The ALJ explained his step four finding as follows:

3 As described by the vocational expert, the claimant has past relevant work as a
4 collections clerk ... and janitor. The vocational expert testified that a hypothetical
5 individual with the claimant's residual functional capacity would be able to
perform his past work as a collections clerk.

6 In his work history report, the claimant described his work duties to include
7 calling debtors, typing, and editing documents. He further noted that, while
8 working as a collections clerk, he lifted less than 10 pounds, st[oo]d for two hours
9 in an eight-hour day, and s[a]t for six hours in an eight-hour day. Moreover, he
stated that he did not need to climb, stoop, kneel, crouch, crawl, handle big
objects, or reach (B5E3-6). At the hearing, the claimant also testified that this
work involved data entry and talking to debtors over the phone.

10
11 In comparing the claimant's residual functional capacity with the physical and
12 mental demands of this work, I find that the claimant was able to perform it as
13 actually performed. Accordingly, I find the claimant is able to perform his past
relevant work.

14
15 *See AR 33.*

16 Plaintiff has the burden to show he is unable to perform his past relevant work. *Tackett v.*
17 *Apfel*, 180 F.3d 1094, 1098–99 (9th Cir. 1999). “Although the burden of proof lies with the
18 claimant at step four, the ALJ still has a duty to make the requisite factual findings to support his
conclusion.” *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). “This is done by looking at
19 the ‘residual functional capacity and the physical and mental demands’ of the claimant’s past
20 relevant work.” *Id.* at 844–45 (quoting 20 C.F.R. § 416.920(e)). To be found not disabled at step
21 four, the claimant must be able to perform either “[t]he actual functional demands and job duties of
22 a particular past relevant job; or ... [t]he functional demands and job duties of the occupation as
23 generally required by employers throughout the national economy.” *Id.* at 845. “This requires
24 specific findings” on the part of the ALJ “as to the claimant’s residual functional capacity, the
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1 physical and mental demands of the past relevant work, and the relation of the residual functional
 2 capacity to the past work.” *Id.* (citing Social Security Ruling (“SSR”) 82–62, 1982 WL 31386).

3 The ALJ in this case found plaintiff had the residual functional capacity (“RFC”):

4 ... to perform light to sedentary work ... except as follows. He can lift/carry 10
 5 pounds frequently and occasionally. He can stand and/or walk two to four hours
 6 in an eight-hour day in 15 to 30 minute intervals. He can sit eight hours in an
 7 eight-hour day in two-hour intervals. He can occasionally stoop, crouch, kneel,
 8 balance, and climb stairs and ramps. He can never climb ladders, ropes, or
 scaffolds, crawl, or reach over shoulder level. He can frequently have face-to-
 face interaction with people. He has no restrictions related to interaction with
 people over the phone.

9 *See AR 23–24* (emphasis omitted). First, given the ALJ’s errors in evaluating the opinion
 10 evidence from Dr. Perez and Dr. Becker, the above RFC assessment cannot be said to completely
 11 and accurately describe all of plaintiff’s mental and physical functional limitations at this time.⁴
 12 Thus, on this basis alone the Court finds the ALJ’s step four determination to be in error, given
 13 that it is based on an erroneous RFC assessment.

15 Second, as noted by plaintiff—and conceded by defendant—the ALJ cited to testimony
 16 that does not exist. The ALJ noted that the vocational expert testified that a hypothetical
 17 individual with the claimant’s RFC would be able to perform his past work as a collections clerk.
 18 The vocational expert offered no such testimony, nor did the ALJ present the vocational expert
 19 with such a hypothetical. *See AR 66–69.* Thus, the Court finds that the ALJ’s step four

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 22
 23 ⁴ If a disability determination “cannot be made on the basis of medical factors alone at step three of the sequential
 24 disability evaluation process,” the ALJ must identify the claimant’s “functional limitations and restrictions” and
 25 assess his or her “remaining capacities for work-related activities.” SSR 96–8p, 1996 WL 374184 *2. A claimant’s
 26 RFC assessment is used at step four of that process to determine whether he or she can do his or her past relevant
 work, and at step five to determine whether he or she can do other work. *See id.* Residual functional capacity is what
 the claimant “can still do despite his or her limitations.” *Id.* It is the maximum amount of work the claimant is able
 to perform based on all of the relevant evidence in the record. *See id.*

1 determination to be in error for this additional reason, given that it was based in part on
2 testimony that does not exist.

3 III. The ALJ's Determination Regarding the Presumption of Continuing Non-Disability

4 The Commissioner may apply administrative *res judicata* “to bar reconsideration of a
5 period with respect to which she has already made a determination, by declining to reopen the
6 prior application.” *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1996). “[T]he principle of res
7 judicata,” though, “should not be applied rigidly in administrative proceedings.” *Vasquez v.*
8 *Astrue*, 572 F.3d 586, 597 (quoting *Lester*, 81 F.3d at 827); *see also Gregory v. Bowen*, 844 F.2d
9 664, 666 (9th Cir. 1988). In regard to “the period *subsequent* to a prior determination,”
10 furthermore, the authority of the Commissioner to apply administrative *res judicata* “is much
11 more limited.” *Lester*, 81 F.3d at 827 (emphasis in original). Normally, the Commissioner’s prior
12 determination “that a claimant is not disabled ‘creates a presumption that the claimant continued
13 to be able to work after’” the date of that determination. *Vasquez*, 572 F.3d at 597 (quoting
14 *Lester*, 81 F.3d at 827)). That presumption of continuing non-disability will not apply, however,
15 “if there are ‘changed circumstances.’” *Lester*, 81 F.3d at 827 (quoting *Taylor v. Heckler*, 765
16 F.2d 872, 875 (9th Cir. 1985)). Where there is “[a]n increase in the severity” of the impairments
17 alleged by the claimant in the prior proceeding, the application of *res judicata* is precluded. *Id.*
18 (citing *Taylor*, 765 F.2d at 875 (while claimant could overcome presumption by proving changed
19 circumstances indicating greater disability, because her condition had improved rather than
20 deteriorated, she had failed to make requisite showing of changed circumstances); *see also*
21 *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988) (to overcome presumption of continuing
22 non-disability, claimant must prove changed circumstances indicating greater disability)).
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1 A claimant, however, need not show that his or her “condition has worsened to show
2 changed circumstances.” *Lester*, 81 F.3d at 827. Rather, as noted by the Ninth Circuit in *Lester*,
3 “[o]ther changes suffice.” *Id.* Thus, “[f]or example, a change in the claimant’s age category, as
4 defined in the [Commissioner’s] Medical–Vocational Guidelines [(the “Grids”)], constitutes a
5 changed circumstance that precludes the application of res judicata.” *Id.* This is “[b]ecause a
6 change in age status often will be outcome-determinative under the bright-line distinctions drawn
7 by the” Grids. *Chavez*, 844 F.2d at 693.

9 “In addition, the Commissioner may not apply res judicata where the claimant raises a
10 new issue, such as the existence of an impairment not considered in the previous application.”
11 *Lester*, 81 F.3d at 827; *see also Vasquez*, 572 F.3d at 597; *Gregory*, 844 F.2d at 666 (finding that
12 because claimant’s application raised new issue of mental impairment, it would be inappropriate
13 to apply *res judicata* to bar her claim) (citing *Taylor*, 765 F.2d at 876 (suggesting *res judicata*
14 may be improper where claimant has presented new facts to show prior adverse determination
15 may have been incorrect)). Further, “all” a claimant “has to do to preclude the application of res
16 judicata is to raise a new issue in the later proceeding.” *Vasquez*, 572 F.3d at 597 n.9. That is, at
17 least in regard to the existence of a new impairment, there appears to be no requirement that the
18 claimant make a showing of severity in regard thereto. *See id.*

20 Plaintiff asserts the second ALJ erred in finding the presumption of continuing non-
21 disability was not rebutted because he failed to properly consider whether there were changed
22 circumstances for two reasons. First, plaintiff argues that the second ALJ failed to consider
23 whether the severe impairment considered by the first ALJ—lumbar strain—has increased in
24 severity. Second, plaintiff argues that the second ALJ failed to consider whether there were
25 changed circumstances due to six new impairments not considered by the prior ALJ, including:

1 right shoulder disorder, fibromyalgia, dysthymic disorder, cannabis dependence, alcohol
2 dependence, and pain disorder. The undersigned agrees that the ALJ failed to consider whether
3 plaintiff presented evidence of changed circumstances.

4 In his decision, the second ALJ found in relevant part as follows:

5 The prior decision issued on February 1, 2011 is ... administratively final and the
6 doctrine of *res judicata* applies Because this is a case in which there has been
7 a prior unfavorable Administrative Law Judge decision, the issue of the
8 presumption of continuing non-disability must be addressed.... Based on my
9 review of the medical evidence submitted since the prior decision, I conclude that
10 the presumption of continuing non-disability has not been rebutted. At the
11 hearing, the claimant, through his attorney, amended the alleged onset date to
12 May 1, 2011. Any reference to evidence that relates to the period adjudicated by
13 the prior decision is for the sole purpose of providing a context to the claimant's
14 current application for benefits.

15 AR 18. As noted above, however, with regard to changed circumstances based on impairments
16 not previously considered, "all" a claimant "has to do to preclude the application of res judicata
17 is to raise a new issue in the later proceeding." *Vasquez*, 572 F.3d at 597 n.9. Here, the second
18 ALJ clearly considered new issues that form the basis for his decision. The prior ALJ found that
19 plaintiff had a severe impairment for lumbar strain. *See* AR 78. In contrast, the second ALJ
20 found six new severe impairments: right shoulder disorder, fibromyalgia, dysthymic disorder,
21 cannabis dependence, alcohol dependence, and pain disorder. *See* AR 21. The ALJ cites to no
22 portion of the record for the period prior to the first ALJ decision to show that the six new severe
23 impairments were significant issues for plaintiff. The record also fails to indicate that the six new
24 severe impairments were actually raised as a basis for plaintiff's claim of disability in the
25 previous proceeding or that the prior ALJ considered the impairments in her decision. *See* AR
26 76–82. Accordingly, the presumption of continuing non-disability has been rebutted, and the
ALJ erred in finding otherwise.

Defendant contends that even if the ALJ improperly applied *res judicata*, the ALJ did not commit harmful error. The undersigned agrees. As noted above, the ALJ’s application of *res judicata* was legal error. However, the plaintiff has the burden of establishing the error resulted in actual harm. *See Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012) (“The burden is on the party claiming error to demonstrate not only the error, but also that it affected his “substantial rights,” which is to say, not merely his procedural rights.”) (citing *Shinseki v. Sanders*, 556 U.S. 396, 407-09 (2009)). Here, the plaintiff has failed to point to any evidence that he was actually prejudiced by the ALJ’s error, and therefore harmed. *McCleod v. Asture*, 640 F.3d 881, (9th Cir. 2012) (“Mere probability [of prejudice] is not enough” to establish harm warranting remand, instead “where the circumstances of the case show a substantial likelihood of prejudice, remand is appropriate so that the agency ‘can decide whether re-consideration is necessary’”) (quoting *Shinseki v. Sanders*, 129 S.Ct. 1696, 1706, 1708 (2009)). Nevertheless, given that this matter is being remanded due to the ALJ’s harmful errors in evaluating the medical evidence in the record and in assessing plaintiff’s ability to return to his past relevant work, on remand the issue of *res judicata* should be re-evaluated in light of the ALJ’s error here as well.

IV. This Matter Should Be Remanded for Further Administrative Proceedings

The Court may remand this case “either for additional evidence and findings or to award benefits.” *Smolen*, 80 F.3d at 1292. Generally, when the Court reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). Thus, it is “the unusual case in which it is clear from the record that the claimant is unable to perform gainful employment in the national economy,” that “remand for an immediate award of benefits is appropriate.” *Id.*

1 Benefits may be awarded where “the record has been fully developed” and “further
 2 administrative proceedings would serve no useful purpose.” *Smolen*, 80 F.3d at 1292; *Holohan v.*
 3 *Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded
 4 where:

5 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
 6 claimant’s] evidence, (2) there are no outstanding issues that must be resolved
 7 before a determination of disability can be made, and (3) it is clear from the
 8 record that the ALJ would be required to find the claimant disabled were such
 9 evidence credited.

10 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076–77 (9th Cir.
 11 2002). Because issues still remain in regard to the medical opinion evidence in the record and
 12 plaintiff’s ability to perform his past relevant work, remand for further consideration of these
 13 issues—as well as, if necessary, the issue of whether plaintiff is capable of performing other jobs
 14 existing in significant numbers in the national economy⁵—is warranted.

CONCLUSION

15 Based on the foregoing discussion, the undersigned recommends the Court find the ALJ
 16 improperly concluded plaintiff was not disabled. Accordingly, the undersigned recommends as
 17 well that the Court reverse the decision to deny benefits and remand this matter for further
 18 administrative proceedings in accordance with the findings contained herein.

19 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure (“Fed. R. Civ. P.”)
 20 72(b), the parties shall have **fourteen (14) days** from service of this Report and
 21 Recommendation to file written objections thereto. *See also* Fed. R. Civ. P. 6. Failure to file
 22 objections will result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn,*
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24 ⁵ If a claimant cannot perform his or her past relevant work, at step five of the sequential disability evaluation
 25 process, the ALJ must show there are a significant number of jobs in the national economy the claimant is able to
 26 do. *See Tackett*, 180 F.3d at 1098–99; 20 C.F.R. § 416.920(d), (e).

1 474 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk
2 is directed set this matter for consideration on **June 3, 2016**, as noted in the caption.

3 DATED this 17th day of May, 2016.
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Karen L. Strombom
United States Magistrate Judge
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